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In The

Supreme Court of the United States

October Term, 1978

STATE OF OHIO,
Plaintiff

v.

COMMONWEALTH OF KENTUCKY,
Defendant

REPLY BRIEF OF THE STATE OF OHIO TO THE EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE SPECIAL MASTER'S REPORT

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REPLY BRIEF OF THE STATE OF OHIO TO THE EXCEPTIONS OF THE COMMONWEALTH OF KENTUCKY TO THE SPECIAL MASTER'S REPORT

INTRODUCTION

On January 22, 1979, Judge Robert Van Pelt[1], the Special Master appointed in this case, submitted his Report and Recommendations to the Court. On the same date, the Report was received and ordered filed by the Court. The Court further ordered that exceptions to the Report be filed by the parties within forty-five days and reply briefs within thirty days. By subsequent Orders, the Court extended the time to file exceptions to the Re-

[1] The Honorable Phillip Forman was the first Special Master appointed in this case. 385 U.S. 803 (1966). In 1977, Judge Forman submitted his resignation and was succeeded as Special Master on July 28, 1978, by Judge Van Pelt. Any reference to Report in this brief is limited to the Report filed by Judge Van Pelt on January 22, 1979, unless otherwise indicated.

port to April 6, 1979, and the time to file reply briefs to June 6, 1979. Exceptions to the Report were filed by the Commonwealth of Kentucky on April 6, 1979.

QUESTION PRESENTED

Whether the Court should adopt the conclusion and recommendation of the Special Master that the boundary between Kentucky and Ohio is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792?

STATEMENT OF THE CASE

This original action was initiated in March, 1966, when the State of Ohio filed a complaint in this Court to determine the location of its boundary with the Commonwealth of Kentucky. Leave to file the bill of complaint was granted. 384 U.S. 982 (1966). In its complaint Ohio alleged that the boundary line between the two states lies at the low-water mark on the northerly side of the Ohio River as it existed in 1792 when Kentucky became a state. In its answer Kentucky alleged that the boundary is an ever-changing line determined by reference to the present day low-water mark on the northerly shore.

On August 30, 1971, Ohio sought leave in this Court to file an amended complaint in which it claimed the middle of the Ohio River as the boundary between Ohio and Kentucky. The Court referred the motion to its Special Master and on April 10, 1972, Judge Forman submitted his Report in which he recommended that the Court deny Ohio's petition to amend its complaint. Oral argument was held on January 10, 1973. The motion for leave to amend was denied and the case was remanded

to the Special Master for further proceedings. 410 U.S. 641 (1973).

Following remand, the parties entered into a stipulation in which they agreed that the boundary line question could be determined as a matter of law without the necessity of further factual development and further agreed to submit that question to the Special Master on briefs. Report, Appendix A, Item 3.[2]

In his Report of January 22, 1979, the Special Master delineated the sole issue now before the Court, pursuant to the stipulation between Ohio and Kentucky, as follows:

THE SOLE ISSUE

> Judge Forman's papers indicate that he had concluded under the stipulation that there was submitted to him this question:
>
> Whether the boundary line between Kentucky and Ohio is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 or the low-water mark on the northerly side of the river as it exists today? I agree with this statement of the issue and will confine this report to that issue only.
>
> Report, at 5.

With respect to that issue, the Special Master concluded:

> that Ohio's claim is correct and that the boun-

[2] Ohio agrees with Kentucky that the second issue raised by the pleadings, the concurrent jurisdiction of the states over the Ohio River, has not been presented to the Special Master and is not now before the Court. Kentucky's Brief, p. 4.

> dary between the State of Ohio and the Commonwealth of Kentucky under the prior decisions of this Court is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and not the low-water mark on the northerly side as it exists today.
>
> Report, at 16.

The Special Master's conclusion is fully supported by the prior decisions of this Court. Accordingly, the State of Ohio urges the Court to adopt the recommendations of the Special Master as set forth in his Report.

STATEMENT OF FACTS

The facts which are relevant to the issue now before the Court are fully set forth in this Court's prior decision in this case, *Ohio v. Kentucky*, 410 U.S. 641, 641-644; The Report of the Special Master at pp. 3-4; and Kentucky's Brief at pp. 5-7.[3]

ARGUMENT

I. THE REPORT OF THE SPECIAL MASTER PROPERLY CONCLUDED THAT THE BOUNDARY BETWEEN THE STATE OF OHIO AND THE COMMONWEALTH OF KENTUCKY IS THE LOW-WATER MARK ON THE NORTHERLY

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[3] Ohio agrees with the historical background set forth in Kentucky's Brief at pp. 5-7 except for the concluding paragraph which asserts that Kentucky has always claimed the present day low-water mark on the northerly side of the Ohio River as its boundary with Ohio.

SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR 1792.

As noted above, the Special Master concluded in his Report that the boundary between Ohio and Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792. Based upon that conclusion, the Special Master recommended to this Court:

> That the Supreme Court of the United States determine that the boundary between the State of Ohio and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and that said boundary is not the low-water mark on the northerly side of the Ohio River as it exists today.
>
> Report, at 16.

In reaching his conclusion and recommendation, the Special Master relied principally upon and followed the prior decision of this Court in *Indiana v. Kentucky*, 136 U.S. 479 (1890). As discussed below, this Court's decision in *Indiana v. Kentucky* is determinative of the issue in this case and fully supports the conclusion and recommendation of the Special Master.

A. THIS COURT'S DECISION IN *INDIANA V. KENTUCKY*, 136 U.S. 479 (1890), IS DETERMINATIVE OF THE ISSUE IN THIS CASE.

In *Indiana v. Kentucky*, the Court was asked to resolve a dispute between those states over their proper boundary line along the Ohio River and in particular to determine the ownership of a tract of land attached to Indiana but known as Green River Island. Kentucky based its claim

to Green River Island, *inter alia,* on the ground that at the time she became a state, June 1, 1792, this tract of land was an island in the Ohio River and that, on that date, Kentucky's boundary extended to the low-water mark on the north side of the river. *Id.* at 503. Indiana, on the other hand, argued that upon her admission to the Union in 1816 her southern boundary was designated as the Ohio River and that, on her date of admission, the Ohio River ran south of Green River Island and a mere bayou separated it from the mainland.

In reaching its decision, the Court in *Indiana v. Kentucky* first reviewed the history of the 1784 cession by Virginia of its territory lying north and west of the Ohio River. This history is thoroughly reviewed not only in *Indiana v. Kentucky* but also in this Court's prior decision in this case, *Ohio v. Kentucky,* 410 U.S. 641, 645-47 (1973); the Report of the Special Master at pp. 7-9; and the Brief in Support of Kentucky's Exceptions to the Special Master's Report at pp. 5-7. As a result, Ohio will not repeat the history of the Virginia cession except to cite the operative language of the deed of cession executed by the delegates of Virginia which provided:

> by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefit of the said States, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory of tract of country within the limits of the Virginia charter, situate, lying, and being, to the northwest of the river Ohio . . .
>
> 1 Laws of the United States 472, 474 (1784).

The Court next reviewed its decision in *Handly's*

Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820), which as discussed in more detail *infra*, held that the boundary between Indiana and Kentucky as a result of the cession by Virginia was the low-water mark on the northwest side of the river. Thus, the Court in *Indiana v. Kentucky* phrased the controlling principle in determining the ownership of Green River Island as follows:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extendeed at that time to low water-mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.
>
> *Indiana v. Kentucky* at 508.

The Court went on to find that the low-water mark of the Ohio River was north of Green River Island when

Kentucky became a state and further held that Kentucky's title to the land was buttressed by Indiana's long acquiescence in Kentucky's exercise of dominion and sovereignty over it. *Id.* at 509-510.

The Special Master correctly held that the principles set forth in *Indiana v. Kentucky* were determinative of the issue in this case because Ohio, like Indiana, was formed out of land ceded by Virginia to the United States in 1784. Report at 7 and 12. Specifically, the Special Master concluded:

> Your Special Master believes that *Indiana v. Kentucky, supra,* answers Kentucky's arguments in this case in three sentences above quoted.
>
> > She [Kentucky] succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky,* 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.
>
> *Id.* at 508.

> Thus, this Court long ago invalidated Kentucky's present contentions. Your Special Master concludes that the decisions in *Indiana v. Kentucky, supra,* and *Handly's Lessee, supra,* control this case.
>
> Report at 12.

The arguments now presented to the Court by Kentucky in support of its exceptions to the Special Master's Report are essentially those presented to the Special Master, and similarly should be rejected by this Court.

B. KENTUCKY'S ATTEMPTS TO DISTINGUISH THIS CASE FROM THE DECISION IN *INDIANA V. KENTUCKY* ARE WITHOUT MERIT.

Kentucky unsuccessfully attempts to distinguish this case from the Court's decision in *Indiana v. Kentucky* by arguing that that case involved an avulsive change in the Ohio River. Kentucky's Brief at 20. A review of the decision in *Indiana v. Kentucky* fails to reveal, however, any discussion of avulsion or any finding of an avulsive change in the river. Rather, the Court properly determined that the boundary between Indiana and Kentucky was fixed when Kentucky was admitted to the Union in 1792:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended *at that time* to low-water mark on the northwest side of the river. She succeeded to the ancient right and

> possession of Virginia, and *they could not be affected by any subsequent change* of the Ohio River . . .
>
> 136 U.S. at 508 (emphasis added).

Indeed, the language used by the Court in *Indiana v. Kentucky* is squarely contrary to the application of traditional common-law principles of avulsion, accretion and erosion. These principles permit or deny changes in boundaries based upon changes in the course of a river and the characterization of those changes as either accretive-erosive or avulsive in nature. The Court in *Indiana v. Kentucky*, however, expressly held that such changes could not affect Kentucky's boundary with Indiana:

> Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, *unaffected by the action of the forces of nature upon the course of the river.*
>
> *Id.* (emphasis added).

Kentucky asserts in its Brief that the Court in *Indiana v. Kentucky* found:

> that (Green River Island) still lay within the boundaries of Kentucky *since the change in the Ohio River around the island had been an avulsive change* . . .
>
> Kentucky's Brief at 20. (emphasis added).

An examination of the opinion in *Indiana v. Kentucky* reveals, however, that the decision of the Court is barren of any such finding.

As Kentucky notes in its Brief, "an avulsion occurs when there has been some violent and sudden change in the bed of a river." Kentucky's Brief at 13. However,

Kentucky concedes in its Brief that the change in the Ohio River around Green River Island was a gradual change which occurred over a long period of time. Kentucky's Brief at 20-21. Any characterization of this gradual change as an avulsive change is Kentucky's, not the Court's.

As Kentucky further notes in its Brief, under the general principles of avulsion, a boundary line is fixed at its location immediately prior to the point in time when the avulsion occurred. Kentucky's Brief at 20. *See also, Arkansas v. Mississippi*, 250 U.S. 39, 45 (1919). In *Indiana v. Kentucky*, however, the Court did not direct that its commissioners determine the boundary line just prior to an avulsion because the Court never found that an avulsion had occurred. Rather, the Court directed its commissioners to ascertain the low-water mark on the north side of the Ohio River as it existed on the day Kentucky was admitted to the Union. *Id.* at 519. Kentucky incredibly asserts that "the Court was not explicit in why it chose the date it did . . .," Kentucky's Brief at 21, and then quotes the exact reason given by the Court:

> If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land

> from the tract in controversy to the State of Indiana. . . . Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river. 136 U.S. at 508.
>
> Kentucky's Brief at 21.

Understandably Kentucky would prefer to distinguish or ignore the clear holding in *Indiana v. Kentucky*. However, any effort to distinguish that case on the grounds that it involved an avulsive change must fail in view of the total absence of any discussion of avulsion in the opinion of the Court, the conceded gradual change in the Ohio River near Green River Island and the clear language in the Court's opinion that the boundary was fixed at the time Kentucky was admitted to the Union "unaffected by the action of the forces of nature upon the course of the river."

C. *INDIANA V. KENTUCKY* WAS DECIDED WITHOUT REFERENCE TO TRADITIONAL PRINCIPLES OF ACCRETION AND AVULSION.

The Court in *Indiana v. Kentucky* recognized that the proper interpretation of the deed of cession executed by Virginia in 1784 was the controlling issue in that case, rather than the application of traditional common-law principles of accretion and avulsion. For example, the Court began its analysis of the opposing positions as follows:

> As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry, therefore, is as to what line

> on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river.
>
> *Id.* at 505.

It was in this context that the Court considered the decision in *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820).

Handly's Lessee v. Anthony was an ejectment action in which the plaintiff claimed land under a grant from the state of Kentucky while the defendant held the land under a grant from the United States, as being part of Indiana. The title to the land thus depended upon whether the land was situated in the state of Indiana or the state of Kentucky. The Court determined that the answer to that question depended upon the proper interpretation of the cession made by Virginia to the United States.

The land in question was surrounded by water when the river was at its middle and usual state. When the river was at low-water mark, however, the land was connected on its northerly side to the state of Indiana. Thus the issue before the Court in *Handly's Lessee* was stated by Chief Justice Marshall as follows:

> The two exceptions present substantially the same questions to the Court, and may therefore be considered together. They are, whether land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low? and whether Kentucky was bounded on the west and northwest by the low-water mark of the river, or at its middle state? or, in other words, whether the State of Indiana extends to low-water mark, or stops

at the line reached by the river when at its medium height?

Id. at 378-79.

In resolving this issue, the Court placed heavy reliance on the inconvenience which would exist if the mid-level mark rather than the low-water mark was used as a boundary. *Id.* at 380-81. Contrary to Kentucky's present argument, the inconvenience referred to by the Chief Justice was not a matter of readily ascertaining a boundary. Rather the Court was concerned that a narrow strip of land under the jurisdiction of Kentucky would exist on the northern shore of the Ohio River during the period of time that the river flowed below its mid-level mark. Thus, the Court reasoned that the boundary of the state of Kentucky extends only to the low-water mark on the western or northwestern side of the Ohio River and does not extend to the river mark at its middle or usual state.

The Court in *Indiana v. Kentucky* recognized the decision in *Handly's Lessee* as having established that the boundary of Kentucky was the low-water mark on the northerly side of the river. The Court then proceeded to determine that the low-water mark referred to in *Handly's Lessee* was the low-water mark as it existed at the time Kentucky was admitted to the Union, "unaffected by the action of the forces of nature upon the course of the river." *Indiana v. Kentucky* at 508.

Kentucky argues that if Virginia intended that the low-water mark be permanently fixed as Kentucky's northern boundary, such an intention must be affirmatively set forth in the deed of cession and cannot be implied. Kentucky's Brief at 16, citing *Leo Sheep Co. v. United States*, —U.S.—, 99 S. Ct. 1403 (1979). The issue in *Leo Sheep* was

whether the United States had reserved an implied right of easement across land granted to the Union Pacific Railroad under the Union Pacific Act of 1862. This Court held that the common-law doctrine of easement by necessity was insufficient to overcome the inference prompted by the omission of any reference in the 1862 Act to such a right. In so deciding, the Court noted that although the 1862 Act specifically listed reservations to the grants, no reservation of a right of easement was contained in the Act.

Although the decision in *Leo Sheep* is distinguishable, the extent to which it serves as precedent in this case would appear to support Ohio's rather than Kentucky's claim. That is, the Court held in *Leo Sheep* that where the grantor makes specific reservations in transferring land, no further reservations will be easily implied. In the present case, when Virginia executed its deed ceding land north of the Ohio River to the United States, it did so:

> upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that the states so formed shall be distinct republican states, and admitted members of the federal union; having the same rights of sovereignty, freedom, and independence, as the other states.
>
> 1 Laws of the United States 472, 473 (1784).

In addition, the Act authorizing the conveyance to the United States also provided: that Virginia was to be reimbursed for any reasonable expenses incurred in maintaining garrisons and forts within the territory so ceded; that

French and Canadian citizens in the territory would have their possessions and titles confirmed to them; that a tract of land in the ceded territory would be reserved for soldiers who served with General George Rogers Clark in the Revolutionary War; and that if land reserved for Virginia troops in the Revolutionary War proved insufficient for their legal land bounties, the deficiency would be made up from land on the northwest side of the river. 1 Laws of the United States 472, 473-74 (1784).

In light of these reservations, it seems clear that if Virginia intended to retain for herself an ever-changing boundary, her deed of cession to the United States would have expressly provided what Kentucky now urges this Court to imply.

D. KENTUCKY'S CLAIM THAT A RULE OF CONVENIENCE REQUIRES AN EVER-CHANGING BOUNDARY IS ERRONEOUS.

As discussed above, in *Handly's Lessee v. Anthony, supra,* Chief Justice Marshall placed great weight on the inconvenience that would result from a boundary formed by the mid-level water mark rather than the low-water mark. In its brief, Kentucky mistakenly argues that the Chief Justice was referring to the rule of accretion/erosion in his discussion of a rule of convenience. Kentucky's Brief at 23. Rather than accretion and erosion, the Chief Justice was concerned with the rising and falling of the water level and "all the *inconvenience* which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side. . . ." *Handly's Lessee* at 381. (emphasis added).

Kentucky interprets the rule of convenience to mean a

rule which promotes readily ascertainable boundaries and discourages boundary disputes. From this premise, Kentucky argues that:

> There are compelling reasons why a fixed line should not be adopted as the boundary between the two states. A static 1792 boundary line would be impossible to determine and impracticable to administer. It is a well known fact that the 1792 boundary line has been obscured over the passage of time. It would be unrealistic to attempt to fix a line as it might have existed in that year.
>
> Kentucky's Brief at 22.

Kentucky's arguments on this score are defective for two principal reasons.

First, a static 1792 boundary line would be no more difficult to administer than would an ever-changing boundary line based upon the present day low-water mark. Kentucky seems to imply that use of a present day low-water mark permits one to physically observe the boundary between the two states at any given time. In other words, Kentucky seems to view the river as being like an ocean with a high tide and low tide on a regular basis.

The low-water mark of a fresh water river has been defined to mean the point to which a river recedes at its lowest stage. *Gould, Law of Waters* § 45, at 106 (3d Ed. 1900). Thus, for the greater part of the year, this mark will be obscured by the river's water while at its usual stage and rising to its high-water mark. Administration of laws based upon the present day low-water mark would thus require a survey and calculations to determine the

true boundary as would laws based upon the 1792 low-water mark.[4]

Kentucky further argues, however, without citation to authority or evidence that the 1792 low-water mark has been obscured by the passage of time and would be impossible to determine. Kentucky's Brief at 22. Kentucky's assertions on this point are simply wrong as is evident from the reported decisions of the Nuclear Regulatory Commission.

In *In the Matter of Public Service Company of Indiana, Inc.*, 8 NRC 253, (Atomic Safety & Licensing Board Docket Nos. STN 50-546, 50-547; Marble Hill Nuclear Generating Station, Units 1 and 2; Decision of August 30, 1978), the Atomic Safety and Licensing Appeal Board (ASLAB) was faced with a challenge by Kentucky to the issuance of a preliminary work permit for the construction of a nuclear generating plant at Marble Hill, a site in southern Indiana on the Ohio River. Kentucky's challenge was based upon its determination that section 401 of the Federal Water Pollution Control Act required a certification by Kentucky regarding any discharge

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[4] Although no evidence regarding the location of the present day or 1792 low-water mark has been taken by the Special Master, Ohio believes a serious question exists as to whether a present day low-water mark can even be determined along the Ohio River. The United States Corps of Engineers has constructed a series of dams at various points on the Ohio River in recent years. As a result of these dams, the water level of the Ohio River is subject to controlled alteration in order to alleviate flooding and drought conditions. The ability of the Corps of Engineers to artificially set or alter the water level of the river adds to the uncertainty of the location of the "present day" low-water mark.

which the plant might make into the Ohio River. Section 401 requires a certification from "the State in which the discharge originates or will originate . . ." 33 U.S.C. §1341 (a) (1).

The utility-owner of the proposed power plant had sought and received a Section 401 certification from Indiana, the state in which the plant would be located. The ASLAB, in an earlier opinion reported at 7 NRC 179, 189-93, had held that the Section 401 certification must come from the state into whose waters the effluent would be discharged. The ASLAB also had held that in making that determination, the Board was bound by the controlling decisions of this Court which placed the boundary at the low-water mark on the northern side of the river in 1792, citing *Indiana v. Kentucky*. The Appeal Board then remanded the cause to the Atomic Safety Licensing Board with instructions to locate the 1792 low-water mark and to determine if the Marble Hill discharge pipes would end in Kentucky water or Indiana water.

On remand, both the utility and the Nuclear Regulatory Commission staff presented evidence as to the location of the 1792 low-water mark. Kentucky declined to present evidence. The Licensing Board found that based upon the evidence presented, the discharge pipe of the power plant would be well within Indiana waters, on the northern side of the 1792 low-water mark. 7 NRC at 577-580. The ASLAB affirmed the decision of the Licensing Board on appeal. 8 NRC 253.

Thus, in proceedings of record, the 1792 low-water mark has been ascertained in a proceeding in which Kentucky actively participated. The evidence presented to the Atomic Safety Licensing Board and the decision of

the Atomic Safety Licensing Appeal Board clearly illustrate the deficiency in Kentucky's present argument that a rule of convenience requires the establishment of an ever-changing boundary based upon the present day low-water mark.

II. THE CONCLUSION OF THE SPECIAL MASTER IS NOT PREMISED UPON A FINDING OF AN AVULSIVE CHANGE IN THE OHIO RIVER.

A. THE CONCLUSION OF THE SPECIAL MASTER IS A CONCLUSION OF LAW IN FULL ACCORD WITH THE PRIOR DECISIONS OF THIS COURT.

At p. 27 of its brief, Kentucky argues:

> The Speecial Master here made his findings that the small dams on the Ohio were avulsive in nature on a record barren of facts.

Ohio has reviewed the report of the Special Master and has concluded that the Special Master neither made a finding nor intended to make a finding that the changes in the Ohio River caused by locks and dams were avulsive in nature. The most the Special Master's Report contains is a reference to inundation of the river banks as a result of dams built on the river and that reference is supported by citation to this Court's decision in *Ohio v. Kentucky*, 410 U.S. 641 (1973), and citation to Reports issued by Kentucky's own Legislative Research Commission. Report at 5-6.

The references made by the Special Master regarding inundation are far from findings as to an avulsive change in the river and do not form any part of the basis for his ultimate conclusion as to the true location of the boun-

dary between Ohio and Kentucky. Kentucky has erroneously characterized the Special Master's statement of the history of this case as a finding and has then mounted an attack on that purported finding in an attempt to undermine the whole of the Special Master's Report.

B. WHETHER AN AVULSIVE CHANGE HAS OCCURRED IN THE OHIO RIVER IS A QUESTION OF FACT TO BE DETERMINED ONLY IF THIS COURT REJECTS THE CONCLUSION OF THE SPECIAL MASTER.

This Court need not address the issue of whether an avulsive change has occurred in the Ohio River unless it determines that the Special Master erred in his conclusion that under this Court's decision in *Indiana v. Kentucky*, the boundary between Ohio and Kentucky is the 1792 low-water mark. In that event, Ohio would agree with Kentucky that an evidentiary hearing would be necessary to determine whether any avulsive changes have occurred as a result of the dams built on the Ohio River. Kentucky's Brief at 27.

Ohio would strongly disagree, however, with Kentucky's contention that the erection of artificial structures can never cause an avulsive change. In its own brief at p. 12 Kentucky cites to the Court's decision in *Arkansas v. Tennessee*, 246 U.S. 158 (1918), wherein the Court noted:

> if the stream from any cause, *natural or artificial*, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary . . .
>
> *Id.* at 173. (emphasis added).

Thus an avulsion may occur from natural *or* artificial causes.

Whether any avulsive changes have occurred is a question of fact and under paragraph 10 of the stipulation entered into between Ohio and Kentucky, questions of fact are reserved for further evidence. Report, Appendix A, Item 10. No such evidence has been taken in this case[5] and none need be taken if the Court affirms the conclusion and recommendation of the Special Master.

III. THE SPECIAL MASTER'S ANALYSIS OF KENTUCKY'S ACQUIESCENCE IN THE 1792 LOW-WATER MARK PROPERLY SUPPORTS THE CONCLUSIONS OF LAW REACHED BY THE SPECIAL MASTER UNDER THE PRIOR DECISIONS OF THIS COURT.

As noted above, the Special Master based his conclusion and recommendation upholding Ohio's claim on the prior decisions of this Court. His conclusion was not premised upon a finding of acquiescence by Kentucky in the 1792 low-water mark and the adoption of his recommendation is not conditioned upon this Court's finding an equitable bar against Kentucky. The Special Master's discussion of acquiescence does support his conclusion and recommendation, however, and Kentucky's attempts to dispute the evidence reviewed by the Special Master are not persuasive.

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[5] In view of the admitted lack of evidence on the issue of avulsion, Kentucky's casual statements on page 29 of its brief to the effect that the construction of dams on the Ohio River has wrought no great change in the course of the river are objectionable as being totally unsupported by the record.

Kentucky claims that a legislative compact between Indiana and Kentucky which was approved by Congress in 1943 "conclusively establish(ed) the current low-water mark on the northerly side of the Ohio River, as it exists at any given time, as the entire boundary between Indiana and Kentucky, with the exception of the Green River Island area . . ." Kentucky's Brief at 30. Based upon this compact, Kentucky argues that, as a matter of law, it cannot be held to have acquiesced in the 1792 low-water mark. According to Kentucky:

> It is thus beyond cavil that Indiana and Kentucky through their legislatures confirmed that their entire boundary, except for that portion fixed by survey at Green River Island, is the low-water mark on the northern side of the Ohio River at any given time, as affected by the processes of accretion and erosion.
>
> Kentucky's Brief at 32.

Kentucky's arguments with respect to the 1943 compact were not presented to, and thus not passed upon, by the Special Master. However, Kentucky's interpretation of the 1943 compact was presented to the Nuclear Regulatory Commission's Atomic Safety and Licensing Appeal Board in connection with the Marble Hill licensing proceeding discussed above. 8 NRC 253.

The ASLAB devoted a substantial portion of its opinion to Kentucky's arguments regarding the 1943 compact and concluded:

> Kentucky's position thus rests on nothing more than its reading of the boundary description contained in the compact. This traces the 1896 survey and the new lines run in 1942 "to the low-water mark on the right side of the Ohio River" and thence

upstream and downstream "at low-water mark on the right side of said river." Kentucky says the term "low-water mark" used there must mean the *present* mark. But the compact does not say that and, in light of its history, we may not reasonably infer that meaning.

First, to do so would mean abandonment of the historic low-water mark which the Supreme Court had approved in *Indiana v. Kentucky* as the demarcation between those states. Were the interstate agreement intended to overturn that decision, we are confident it would have said so expressly in these circumstances.

Second, for reasons we have mentioned, we do not find the historic line and the current low-water mark incompatible. Rather, we agree with the staff that the 1942 lines were simply drawn arbitrarily to close a gap left in the area of Green River Island, an *ad hoc* political solution (in the best sense of that term) to a thorny local boundary dispute. Were the entire Kentucky-Indiana border of several hundred miles involved, that would have been made unmistakable in light of interests elsewhere along the river which would be affected by such a change. We find it hard to believe that the Ohio has remained in its historic channel everywhere except at Green River Island.

Finally, the "simple" answer which Kentucky derives from its reading of the compact is inconsistent with the nature of the problem sought to be remedied. The Commonwealth fails to explain why the two states would wish to disturb a boundary for hun-

> dreds of miles to close a gap of a few hundred yards. As we have observed before, "in construing statutes, 'context and purpose outweigh syntax'."
>
> 8 NRC 253 at 264-265 (footnotes omitted).

Kentucky also suggests in its brief that the state of Indiana agrees with Kentucky's position that the 1943 compact established the entire boundary between the two states at the present day low-water mark. As Kentucky is aware, the state of Indiana has expressly rejected that interpretation in another Original Action now pending before this Court. *Kentucky v. Indiana*, Original No. 81 (October Term, 1978).

In its Brief in Opposition to Kentucky's Motion for Leave to File Complaint, Indiana, through its Attorney General, stated its position regarding the boundary line between the two states as follows:

> Litigation regarding various boundary disputes between Indiana and Kentucky was commenced as early as 1820, or four years after Indiana became a State. Those various disputes have resulted in decisions favorable to both states. One common thread connecting the decisions issued by this Court in those cases is that *the boundary line is the low-water mark on the Indiana side of the Ohio River as it existed when Kentucky became a state.*
>
> Now, however, Kentucky is asking this Court to declare the boundary line between Indiana and Kentucky to be "the low-water mark on the northerly side of the Ohio River as it presently exists . . ." This change of position, coming more than eighty years after the last decision by this Court, is completely unjustified and should be disallowed.

Indiana's Brief in Opposition to Motion for Leave

to File Complaint, Original No. 81, (October Term, 1978) at p. 3.

Thus, it seems clear that Kentucky's current interpretation of its 1943 compact with Indiana is neither shared by Indiana nor accepted by the federal administrative bodies which have been called upon to interpret the compact.

It also seems clear that the 1943 compact does not undermine the significance which the Special Master attached to the evidence discussed in his Report concerning Kentucky's acquiescence in the 1792 low-water mark. The Special Master noted that reports issued by the Kentucky Legislative Research Committee and an Opinion issued by the Kentucky Attorney General both recognize the low-water mark on the northern shore of the Ohio River as it existed in 1792 to be the boundary between Kentucky and Indiana. Report at 13. It is important in this regard to note that both the legislative research reports and the Attorney General's Opinion were prepared over twenty years *after* the 1943 compact which Kentucky now argues conclusively established the boundary at the present day low-water mark.

The conclusion reached in the legislative research reports and the Attorney General's Opinion are also supported by various decisions from Kentucky's state courts. For example, in *Perks v. McCracken,* 169 Ky. 590, 184 S.W. 891 (1916), the Kentucky Court of Appeals stated the issue concerning the ownership of an island in the Ohio River lying between Kentucky and Illinois as follows:

The case turns on whether or not the island is Ken-

> tucky territory or is a part of the state of Illinois. When Virginia ceded to the United States the Northwest Territory in the year 1784, she retained title to the bed of the Ohio river to the low-water mark on its north or northwest side. When Kentucky became a state on June 1, 1792, she succeeded to the rights of Virginia. Her jurisdiction continues just as it existed at the time of her admission to the Union, and is not affected by the action of the forces of nature upon the course of the river. *State of Indiana v. State of Kentucky*, 136 U.S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 329; *Church v. Chambers*, 3 Dana, 279; *McFarland v. McKnight*, 6 B. Mon. 500; *Fleming v. Kenney*, 4 J. J. Marsh, 155. The question is, where was the low-water mark at the time Kentucky became a state, and does the island in question lie between the low-water mark as it then existed and the Kentucky shore? If so, it is a part of Kentucky.
>
> *Id.* at 184 S.W. 891.

In sum, the evidence cited by the Special Master regarding Kentucky's acquiescence in the 1792 low-water mark fully supports the conclusion and recommendation reached by the Special Master under the prior decisions of this Court. Furthermore, Kentucky's assertion in its statement of facts that Kentucky has always claimed the present day low-water mark as its boundary is contradicted by the reports and opinion referred to above. Kentucky's new argument regarding the 1943 Kentucky-Indiana compact does nothing to undermine the conclusion reached by the Special Master in his Report to this Court.

CONCLUSION

The conclusion of the Special Master that the boundary between Ohio and Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 is fully supported by the prior decisions of this Court. The recommendation of the Special Master that this Court establish the 1792 low-water mark as the boundary between Ohio and Kentucky should therefore be adopted. Ohio further agrees to and supports the three additional recommendations of the Special Master which appear at pp. 16 and 17 of his Report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael R. Szolosi, Special Counsel to the Attorney General of the State of Ohio and a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of June, 1979, I served three copies of the foregoing Reply Brief, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky and to Judge Robert Van Pelt, Special Master.

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